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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

FACEBOOK, INC., and MARK ZUCKERBERG, Plaintiffs, v. CONNECTU LLC, (now known as CONNECTU, INC.), CAMERON WINKLEVOSS, TYLER WINKLEVOSS, DIVYA NARENDRA, PACIFIC NORTHWEST SOFTWARE, INC., WINSTON WILLIAMS, WAYNE CHANG, DAVID GUCWA, and DOES 1-25, Defendants.	CASE NO. C 07-01389 RS **DEFENDANTS WINSTON WILLIAMS AND PACIFIC NORTHWEST SOFTWARE, INC.'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL SUPPLEMENTAL RESPONSES TO INTERROGATORY NOS. 3 AND 4** Date: November 28, 2007 Time: 9:30 a.m. Dept.: 4 Mag. Judge: Hon. Richard Seeborg

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I. INTRODUCTION

Wasting time and money, Plaintiffs move to compel further answers to two interrogatories for which there is no further information. Defendants have told Plaintiffs on several occasions that the current responses are the only responses. Several days before the opposition was due, Defendants sent Plaintiffs a signed declaration confirming what they had been told for some time--i.e. that there is no additional information available to supplement these interrogatories. Mosko Decl. Exh. 1. Yet, Plaintiffs still refused to take this motion off calendar.

Plaintiffs incorrectly believe that Defendants have evidence revealing who received certain email communications, i.e. the subject of the interrogatories at issue in this motion. Plaintiffs' belief stems from the deposition of Winston Williams where he testified that it *may be possible* for him to determine how many emails were sent from ConnectU to persons in California. Specifically, Mr. Williams testified that it may be possible to extract such information if he had access to a particular database he created while working for Pacific Northwest Software ("PNS"). After Plaintiffs insisted on further answers to these interrogatories, an investigation ensued, which concluded that this database would not assist Defendants in responding to these questions. Plaintiffs have now been told several times that, after investigation, Mr. Williams cannot further supplement his responses based on the information contained in the database, or any other information about which he is aware. On November 5, 2007, Plaintiffs were provided with a signed declaration by Mr. Williams confirming that the database was unhelpful in responding to these interrogatories. Plaintiffs' insistence that this motion go forward is further proof of harassment.

Simply put, there is no information available to either PNS or Mr. Williams that would enable them to provide supplemental responses to Interrogatory Nos. 3 & 4. Their answers are complete and this motion must be denied. Defendants further request an Order requiring Plaintiffs to pay them for the cost of preparing this Opposition.

II. STATEMENT OF FACTS

In 2004, PNS was hired to complete software programming work for ConnectU. Mosko Decl. Exh. 2 at 43:8-13. Upon receipt of the work from ConnectU, John Taves, the CEO of PNS, following his usual course of business, put one of his programmers in charge of the project. In this case, the programmer was Winston Williams. *Id.* at 54:20-55:6; 61:25-62:4. Mr. Taves routinely takes a "hands-off" approach when supervising his employees and allows them great autonomy in their work. *Id.* at 81:9-82:8; 112:18-113:6. While Mr. Williams was in daily contact with ConnectU during this project, Mr. Taves was called upon for general advice only on rare occasions. *Id.* at 114:12-14.

In their Second Amended Complaint, Plaintiffs allege that the work completed by PNS and Mr. Williams on behalf of ConnectU violated the Computer Fraud and Abuse Act (18 U.S.C. §1030), California Penal Code Section 502 (c), and the Federal CAN-SPAM Act (15 U.S.C. §§ 7701, et. seq.). *See* Second Amended Complaint. Plaintiffs allege that ConnectU hired PNS and Mr. Williams to write software that would enable unauthorized access to thefacebook.com, for the purpose of extracting email addresses and other personal information. (Second Amended Complaint at ¶ 26.)

PNS and Mr. Williams filed a motion to dismiss, claiming that the court lacked personal jurisdiction over them. Prior to deciding this motion, the Court allowed limited discovery on the issue of jurisdiction. On May 23, 2007, Plaintiffs propounded their First Set of Interrogatories to PNS and Mr. Williams and both parties responded to the interrogatories. Both PNS and Mr. Williams were deposed during the limited jurisdictional discovery. As stated, based on testimony elicited during the depositions, Plaintiffs bring this motion to compel further responses to Interrogatories Nos. 3 & 4.

As shown, the testimony that apparently served as the catalyst for this motion was based on an assumption by Mr. Williams. Plaintiffs have been advised that Mr. Williams has now tested this assumption and has concluded that it is not possible to determine the information requested. Several days before filing their opposition, Defendants submitted a copy of Mr. Williams' declaration to Plaintiffs in yet another effort to convince them that no additional information is available concerning this discovery. Mosko Decl. Exh. 1 and 3. That same declaration is filed in support of this Opposition. Plaintiffs again refused to take this motion off calendar, necessitating the filing of this opposition.

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The interrogatories at issue in Plaintiffs' motion and the responses to these interrogatories are set forth below:

INTERROGATORY NO. 3:

IDENTIFY ALL Internet Protocol ("IP") Addresses and URLs that YOU used OR accessed to obtain any data from any website associated with Facebook, Inc. (including but not limited to the www.thefacebook.com and www.facebook.com), the purpose for the use or access, and ALL dates in which such URLs or IP addresses were accessed by YOU.

PNS RESPONSE TO INTERROGATORY NO. 3:

This interrogatory is unintelligible. It further assumes facts not in evidence. This interrogatory is compound and complex and comprises at least three separate interrogatories. The phrase "obtain any data from any website associated with Facebook, Inc." is vague and uncertain. Subject to these objections and the general objections and the objections to the definitions and instructions incorporated herein, Responding party answers as follows: Responding party has no knowledge that will enable it to answer this interrogatory. Responding party believes Winston Williams may have information regarding this interrogatory.

WINSTON WILLIAMS RESPONSE TO INTERROGATORY NO. 3:

This interrogatory is unintelligible. It further assumes facts not in evidence. This interrogatory is compound and complex and comprises at least three separate interrogatories. The phrase "obtain any data from any website associated with Facebook, Inc." is vague and uncertain. Subject to these objections and the general objections and the objections to the definitions and instructions incorporated herein, Responding party answers as follows: Responding party identifies the following Internet IP addresses that were used to obtain data from the facebook.com: 207.244.158.164, 207.244.158.165 and 207.244.158.34.

INTERROGATORY NO. 4:

IDENTIFY all instances (including dates) when YOU distributed email communications to email addresses obtained originally from FACEBOOK, including identification of ALL email addresses of PERSONS in California.

PNS RESPONSE TO INTERROGATORY NO. 4:

This interrogatory is unintelligible. It further assumes facts not in evidence. Subject to these objections and the general objections and the objections to the definitions and instructions incorporated herein, Responding party answers as follows: Responding party has no knowledge that will enable it to answer this interrogatory. Responding party believes Winston Williams may have some information regarding this interrogatory.

WINSTON WILLIAMS RESPONSE TO INTERROGATORY NO. 4:

This interrogatory is vague, ambiguous, uncertain and unintelligible. It further assumes facts not in evidence. Subject to these objections and the general objections and the objections to the definitions and instructions incorporated herein, Responding party answers as follows: ConnectU's website included a page which allowed its members, who were also members of thefacebook.com, to join ConnectU. When a ConnectU member, who was also a member of thefacebook.com wanted ConnectU to invite his or her thefacebook.com friends to join ConnectU, the ConnectU member would complete this page on the ConnectU website. By completing this page on the ConnectU website, the ConnectU member volunteered his or her access information from thefacebook.com to ConnectU and authorized ConnectU to use this access information to get his or her friends' email addresses found on the facebook.com, and invite them to join ConnectU. Responding party cannot identify specific dates this activity occurred.

Mosko Decl. Exhs. 4-A at 5-6 and 4-B at 5-6.

As shown below, the testimony upon which Plaintiffs apparently base this motion reveals that Mr. Williams guessed that it ***may be possible*** to determine how many emails were sent by ConnectU to persons in California and that it ***may be possible*** to determine how many California email addresses were obtained from facebook.com and imported to ConnectU. Mr. Williams testified as follows:

Q. Is there a function that would permit somebody reconstructing events to know how many e-mails were sent by ConnectU to students in California school?

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A. *It would be complicated to do something of that nature, and I don't know that it has been done or is an existing function. It may be possible yeah.* I mean, I'm sure it's possible in some, yes.

Q. Is there anywhere that the sending of emails by ConnectU is logged -- or was logged in this ConnectU system?

A. Yes

Q. All right. Where was that logged?

A. On the database server at PNW Soft data center.

Q. All right. So all the emails that would have been sent in the period of time that the ConnectU code was hosted by PNS server would be logged?

A. At some point they were logged. *Not necessarily permanently*, but they were logged, yes.

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Q. Okay. How -- you say it might be difficult to reconstruct that information. Do you have a sense how difficult?

A. Yeah. I mean, I believe you need to first determine every school that's in California and then determine every e-mail address domain extension for every

> school in California, and then you would need to determine every possible, like, iteration of that e-mail domain extension, and then you would have to have some way of filtering through the database and scanning through all of the e-mail addresses and applying to which ones actually were related to students at California schools.

Mosko Decl. Exh 5 at 156:17-158:9 (emphasis supplied). Mr. Williams was also asked if there was a way to find out if any email addresses for California students were extracted from the Facebook website:

> Q. Is there any way to equally determine the extent e-mail accounts were obtained from the Facebook Website and imported to ConnectU which ones came from California schools?
>
> *****
>
> A. There *may* be some way.

Id. at 159:9-21 (emphasis supplied).

Plaintiffs jumped on this testimony, demanding that Defendants supplement their responses to these interrogatories. As promised during the meet and confer communications, Defendants did the investigation requested by Plaintiffs[1]. Mr. Taves searched the PNS servers referenced in Mr. Williams' deposition and was able to locate the file he referenced. Mosko Decl. Exh. 7. Plaintiffs were further advised that the files identified as a result of Mr. Taves' searches were in a complex format and accessing the requested information was not as simple as, for example, opening an excel spreadsheet and scanning through tables. Mosko Decl. Exh. 8. Due to the complex format, it took some time and substantial effort to put them into a format in order to determine whether these files provided additional information that would be responsive to Interrogatory Nos. 3 or 4. *Id.*

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[1] Mr. Williams has not been associated with PNS for well over one year. Mr. Williams created these files, but because he is no longer associated with PNS, he has not seen or had access to them for some time, as they were located and found on PNS servers. See Mosko Decl. Exh. 5 at 39:16-20 and 49:13-21. Defendants went beyond what they were required to do by asking Mr. Williams to assist in analyzing these files in hopes that such efforts would convince Plaintiffs that this database would not assist either PNS or Mr. Williams in further responding to this discovery. Amazingly, despite this effort and despite being provided with Mr. Williams' declaration several days before their opposition was due, Plaintiffs still refused to take this motion off calendar. See Mosko Decl. Exhs. 1 and 6.

After considerable effort was expended, it became clear that these files would not provide further information that was responsive to Interrogatory Nos. 3 and 4. Mosko Decl. Exh. 3 at ¶ 5. As the attached declaration of Winston Williams provides, the files referred to in his earlier deposition did not assist in determining whether any of the email addresses listed in the database table were used by ConnectU for the purposes of inviting others to join the ConnectU website. *Id.* at ¶ 5. Additionally, Mr. Williams concluded there was no way he could determine if any emails were sent to any persons at California schools. *Id.* at ¶ 6. Mr. Williams indicated that despite his deposition testimony, the same testimony that was mischaracterized in Facebook's opening brief, he would not be able to supplement his responses to Interrogatory Nos. 3 & 4 because no further information was available in the database. *Id.*

The difficultly of this investigation should not have been a surprise to Plaintiffs. At his deposition, Mr. Williams testified that the process he was thinking about was "complicated" He further states, "I don't know that its been done or is an existing function." Mosko Decl. Exh. 5 at 156:23-24. Mr. Williams then described the complicated process and numerous steps that he believed would be required in order to extract the information. *Id.* at 156:22 - 158:07. As noted, at the time of his deposition Mr. Williams had never conducted such a task, so any testimony regarding the extraction of the requested information was speculatory in nature. *Id.* at 156:23-24. As further noted in testimony quoted above, and conspicuously absent from Plaintiffs' Moving papers, Mr. Williams testified that key information that would allow this task to be successfully completed might not have been saved. Mr. Williams testified that the emails that would have been sent in the period of time that the ConnectU code was hosted by a PNS server would have been logged, but "not necessarily permanently" logged on the PNS servers. *Id.* at 157:10-14. Indeed, despite the searches performed, the PNS servers did not contain any log information.

Defendants conveyed the above information to Plaintiffs shortly after it was learned. Defendants encouraged Plaintiffs to withdraw this motion, to no avail. Mosko Decl. Exh. 8. This motion must now be denied.

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III. ARGUMENT

This motion to compel must be denied. Based on a review of the record and the exhibits submitted in support of and in opposition to this motion, it is clear that PNS and Mr. Williams have supplied fully responsive interrogatory responses based on the information available to them. According to Rule 33 of the Federal Rules of Civil Procedure, the answering party must furnish "such information as is available to the party." Fed.R.Civ.P. 33. Here, there is simply no additional information available to either PNS or Mr. Williams that would allow them to further supplement their responses to Interrogatory Nos. 3 & 4.

A. PNS Has Provided Complete Responses to Interrogatory Nos. 3 & 4

Facebook asserts that "PNS refused to answer Interrogatory No. 3 altogether" and "as with its response to Interrogatory No. 3, PNS refused altogether to respond [to Interrogatory No. 4]." Opening Brief at 6, 7. This argument is baseless. As demonstrated throughout Mr. Taves deposition, he and PNS were unaware of the work that Mr. Williams was completing for ConnectU. Mosko Decl. Exh. 2 at 112:18-113:6. When asked directly if he was aware of the details of the ConnectU project, Mr. Taves testifies as follows:

> Q. I'm trying to figure out who manages these projects, because if Wayne -- if Winston spent a great deal of time on this product, it seems to me because your company is small that you would know what Winston is doing. I'm doing the same thing you did. Were you not aware of the projects he was working on?
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> *****
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> A. You're correct, I was not aware of the details of what Winston is working on.

Id. Mr. Taves testimony demonstrates that Mr. Williams completed a significant portion of the ConnectU work and that he was not involved in any significant way. *Id.* at 89:4-21. Mr. Taves testified that, "I don't think I can contribute any information as to anything about the Social Butterfly or Facebook importer or whatever it is, because Winston was a major developer for ConnectU, and he's not an employee, so, you know, I don't have the information." *Id.* There is simply no additional information available to PNS that would allow it to further supplement its responses.

Plaintiffs dedicate a number of pages in their opening brief to the duties and obligations associated with responding to Interrogatories. Opening Brief at 8-10. In this instance however, there is no additional information or source *available to PNS* that will provide more information about these interrogatories. As Mr. Taves testified, there was no one at PNS who could answer this question. PNS did however identify a source (i.e. Mr. Williams) who might have additional information. Plaintiffs fail to cite any authority that would require PNS to do more than it did, because no such authority exists.

Plaintiffs argue that PNS's billing records indicate they have not complied with this duty. *Id.* at 8. Plaintiffs argue that Mr. Williams' billing entry on January 12, 2006 that he had "started system to calculate # of e-mails sent to students at California schools" creates an obligation for PNS to produce the information. *Id.* at 4, 8. First, a billing note indicating that Mr. Williams had "started a system" to calculate the number of emails sent to California students does not establish that such a system was ever completed or successful. Interestingly, Plaintiffs took two separate depositions of PNS and failed to even inquire about this record. Second, the accompanying declaration, which Plaintiffs had well before this motion, effectively ends the issue, as the actual creator of the files himself states there is simply no additional source to consult that would provide additional information regarding this discovery. PNS provided its best information, which is all that it could do. The motion as it concerns PNS must be denied.

B. Winston Williams Has Provided Complete Responses to Interrogatories Nos. 3 & 4

In his response to Interrogatory No. 3, Mr. Williams provided the IP addresses of the PNS servers he used to access the Facebook.com website. Plaintiffs argue, however, that he "did not indicate the purpose for which he accessed the Facebook servers…." Opening Brief at 6. In light of Mr. Williams response and the interrogatory language, this argument is nonsensical. First, Mr. Williams clearly states in his response that he used the IP addresses "***to obtain data from the facebook.com website***." Mosko Decl. Exh. 4-B at 5 (emphasis added). Second, the answer is implied in the interrogatory itself: "IDENTIFY ALL Internet Protocol ("IP") Addresses and URLs that YOU used OR accessed ***to obtain any data from any website associated with Facebook.com, Inc***." *Id.* (emphasis added). Mr. Williams response to Interrogatory No. 3 is complete and this Court must deny Plaintiffs motion to compel.

Mr. Williams has no information available to him that would allow him to supplement his answer to Interrogatory No. 4. Plaintiffs argue that Mr. Williams "did not provide any details of specific instances of emails sent by Defendants, as called for in this interrogatory." Opening Brief at 7. Further, Plaintiffs claimed "Mr. Williams testified that the information sought by this interrogatory could be obtained, and PNS' billing records show that Mr. Williams had, in January 2006, calculated at least how many emails were distributed to California residents." *Id.* This is a total mischaracterization of the evidence. Nothing in the record indicates that Mr. Williams calculated how many emails were distributed to California residents in January 2006, or any other time. As discussed above (*see* page 8, *supra*), the existence of a short entry in a time sheet indicating that Mr. Williams had "started a system" to calculate the number of emails sent to California students does not establish that such a calculation was ever completed. Additionally, as previously discussed (*see* pages 5-6, *supra*), Mr. Williams cannot restructure the database he once maintained to determine whether any emails were sent to students in California. Mosko Decl. Exhs. 1, 3 and 8.

Mr. Williams testified at his deposition that over a year had passed since he had worked for PNS and over a year had passed since he had worked with the referenced database. Mosko Decl. Exh. 5 at 39:16-20 and 49:13-21. After recently participating in an analysis of the database referenced in his deposition, Mr. Williams has conclusively determined that he cannot further supplement his answers to Interrogatory Nos. 3 & 4. Mr. Williams no longer works for PNS and has provided all of the information that he is capable of providing. The motion to compel Mr. Williams to further supplement his responses to Interrogatory Nos. 3 & 4 must be denied.

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IV. CONCLUSION

For the foregoing reasons, Plaintiff's motion should be denied.

Dated: November 7, 2007

FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, L.L.P.

By: /s/
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